United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

To be argued by
SAMUEL J. WARMS

ORIGINAL

75-6065

UNITED STATES COURT OF APPEALS

For The Second Circuit

Case No. 75-6065

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P/S

CITY OF NEW YORK,

Plaintiff-Appellant,

-against-

UNITED STATES OF AMERICA,

Defendant-Appellee.

On appeal from the United States District Court for the Southern District of New York

APPELLANT'S REPLY BRIEF

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(1)

The appellee's brief seems to assume that the City is welded to the position that the only proper rule applicable to cases of state immunity is the "governmental versus proprietary" rule which was so thoroughly repudiated by Justices FRANKFURTER'S and STONE'S opinions in New York v. United States, 326 U.S. 572 (1946) (applee's br. p. 8). This is a misunderstanding, as a proper reading of the City's brief will show (applt's br. pp. 15, 16, 17).

What we urge is that even though

the present high Court may adopt Justice FRANKFURTER'S criteria or those of Justice STONE or even a new group of criteria of its own formulation, the present state of the law - even though a majority of the Court in New York v. United States voiced dissatisfaction with it - is the old "governmental versus proprietary" test. There is no certainty that either Justice FRANKFURTER'S or Justice STONE'S formulations will become the law. An entirely new formulation may replace the present unsatisfactory rule.

We do not say that it is outside the sphere of this Court's duty to declare unsound the earlier decisions of a higher court where the underpinning of those decisions has been removed by changes in doctrine. As Judge LEARNED HAND, dissenting in Spector Motor Service v. Walsh, 139 F. 2d 809 (2 Cir. 1944), mod. sub nom Spector Motor Co. v. McLaughlin 323 U.S. 101 (1944), said (p.823):

> "I agree that one should not wait for formal retraction in the face of changes plainly foreshadowed; the higher court may not entertain an appeal in the case before the lower court, or the parties may not choose to appeal. In either event the actual decision will be one which the judges do not believe to be that which the higher court would make."

But we do say that the City's pleading qualifies for immunity under the "governmental versus proprietary" rule as well as under both of the disparate formulations of Justices STONE and FRANKFURTER in New York v. United States.

We have felt - and our main brief probably reflects the feeling - that it is more conservative to advance a settled doctrine than those previsioned by two formulations of separate minorities of the high Court in a case whose result admittedly followed from application of the older rule, especially when the two newer formulations clash with each other. In New York v. United States, it is true that a majority* found the older rule untenable and not without some sound reason.

Just as the result in New York v. United States would have been the same under the old doctrine and under both of the new formulations made in the opinions of that case, so the result in the case at bar should be the same under the old or any one of the two newer formulations, a result upholding the legal sufficiency of the complaint.

*A reading of the concurring opinion of Mr. Justice RUTLEDGE, makes it questionable whether he agreed with more than the result of Justice FRANKFURTER'S opinion.

It is not true, as the government states (Applee's br. p. 8, f.n.) that our "second level" argument is for leave to amend the complaint to contain allegations of "greater specificity" to meet the requirements of the dicta of New York v. United States. Point II of our main brief (p. 16) makes this quite clear.

It is true that together, the opinions of Justices STONE and FRANKFURTER reject the old rule. But they cannot be melded to form any new rule. We nevertheless feel that many of the transactions which may be proven in this case will meet the "uniquely governmental" requirement of Justice FRANKFURTER and the "undue interference with sovereign functions" requisite of Justice STONE.*

(2)

The appellee's notion (Applee's br. pp. 10, 12) that the amount of burden is to be compared with the total of the City's budgeted expenses to determine whether the burden on sovereignty is "undue" sets forth an unjustified and untenable method of measuring immunity and

*The example given in our main brief, extradition travel, is, if anything, stronger than the 38 caliber gun and bullets cited as an example by the Court below (f.n. 24a) and referred to by Appellee (Applee's br. p. 10, f.n.).

hence, applicability of the tax.* Such a notion for one thing would invalidate the same tax on an identical transaction where the political subdivision was small and the tax constituted a substantial portion of its expenses.

Moreover, it would continue the same tax as valid where its rate and hence its relative impact was increased but the nature of its burden remained the same.

The undue burden of which Mr. Justice STONE wrote is to be measured by the nature of the tax and the activities on which it is imposed, not its relative fiscal impact. We doubt whether any case dealing with governmental immunity ever alluded to the relative impact of the tax involved in money terms. Even a tax on a Statehouse or on the tax receipts of a state government, which Justice FRANKFURTER cited as examples of immunity because of their uniqueness (326 U.S. at p. 582) would pass muster under appellee's theory if they were minuscule in amount compared to the state's

*The Court below is credited by appellee with accepting this and another argument and finding that "the burden is neither substantial in terms of the city's overall budget nor unavoidable to the extent that other less expensive modes of transportation are available" (Applee's br. p. 12). The Court did not do that for which it was credited, nor did it base its decision on either of the arguments.

expenses.

If applied to federal immunity, the theory would permit the states to impose a modest tax on federal properties and activities if the disparity between the annual costs for such a tax and the federal budget were - as likely it would be - great indeed.*

(3)

Even more absurd and unworkable is the appellee's "contention that [the] tax cannot be considered a burden if the taxpayer can avoid paying [it] by using an alternate means of non-taxable transportation. (applee's br. pp. 11, 12). We need not spell out the incongruous results of such a requirement nor the kind of evidence each transaction would require to demonstrate its immunity. It is enough to mention the savings in working time which air travel in lieu of train, bus or other transport, effects.

(4)

Our allusion to "interrogatories under Rule 33" (applt's br. p. 15) had nothing to do

*In M'Culloch v. Maryland 17 U.S. [4 Wheat.] 316 (1819) the tax on the federal bank's notes ranged from 1 to 2% of their face amounts (id. at p. 321).

with those sought by the United States. (applee's br. pp. 11, 12). Viewed in context it is plain that it referred to details of the taxed transactions to determine their uniquely governmental and sovereign qualities. It was not a suggestion that the City "have it both ways" (applee's br. pp. 11-12).

(5)

We are not as sure as appellee is that Texas' stipulation that the taxes imposed "represent a user charge" was prompted by the thought that the claim otherwise would be frivolous (Aplee's br. p. 13). Texas' briefs both in the District court and the Court of Appeals ignored this part of its stipulation and treated the tax for what it was, a tax whose burden on state activities violated well settled principles of intergovernmental immunity. It seemed to repudiate its stipulation, but clearly the Courts held to it.

(6)

While it may be true that the Supreme Court has said regarding the taxing power that "there is no such limitation upon the plenary power to regulate commerce" (United States v. California 297 U.S. 175, 185 (1936), it is hardly accurate to look to the commerce clause

as the authority for the tax at bar. That tax, after all, is part of the Internal Revenue Code as it always has been since its inception in 1941. Is it possible that the tax which found its source in an earlier law as part of the taxing power, upon its amendment in 1970 (Applt's br. p. 5) owed its being to the commerce power?

We recognize that Congress can regulate intrastate flights and can tax them as well. But its regulatory action is under the commerce power and its taxing activities under its power to "*** lay and collect Taxes, Duties, Imposts and Excises" (United States Constitution, Art. 1, §8, Cl. 1). We pointed to the taxing of intrastate flight not to show that that would [illegible]rogate Congress' power to regulate air [illegible]ransportation" (Applee's br. p. 14) but to show that the tax was levied under the taxing power not the commerce power.

January 19, 1976

Respectfully submitted,

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AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

State of New York, County of New York, ss.:

JAMES BURNS

being duly sworn, says, that on the 16 day of [redacted] Jan, 1976

at No. 1-57 Andrews Plaza in the Borough of MAN H in The City of New York, he served three copies

of the annexed APPELLANTS-REPLY-BRIEF upon Paul J. Curran Esq.,

the attorney for the Def't-APPELLEE in the within entitled action by delivering

three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and leaving the same with him.

Sworn to before me, this 16
day of Jan, 1976

James Burns

Carlos M Rodriguez

CARLOS M. RODRIGUEZ
Commissioner of Deeds
City of New York No. 2-2803
Certificate Filed in New York County
Commission Expires October 1, 1977

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